

service to subsidize their chief competitors, the incumbent LECs. This cross-subsidy from new entrants to incumbents is a paradigmatic market distortion that skews competition. Accordingly, it is the polar opposite of a regulatory action that is neutral to competition. Because the Interim LEC Fund is not competitively neutral, it cannot satisfy any of the safe harbors in section 253(b) and must be preempted as a barrier to entry that is prohibited by section 253(a).

In addition, and independently, the Interim LEC Fund cannot satisfy section 253(b)'s safe harbor for universal service programs because it is not "consistent with section 254," the provision of the federal Act that governs universal service programs. As explained above, section 254 expressly requires the federal USF to be funded by all telecommunications carriers.<sup>50</sup> Moreover, subsection (f) of section 254 expressly requires *state* universal service programs to be funded by all telecommunications carriers who provide intrastate service.<sup>51</sup> Because the Interim LEC Fund is funded exclusively by a single class of carriers – not all telecommunications carriers in South Carolina – it is flatly *inconsistent* with section 254 and therefore cannot be saved from preemption as a universal service program that satisfies section 253(b).

---

<sup>49</sup> *Western Wireless* ¶ 10.

<sup>50</sup> 47 U.S.C. § 254(b)(4), *id.* § 254(d).

<sup>51</sup> 47 U.S.C. § 254(f) provides in pertinent part: "A State may adopt regulations not inconsistent with the Commission's rules to preserve and enhance universal service. Every telecommunications carrier that provides intrastate telecommunications services *shall contribute*, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."

**II. THE COMMISSION MUST PREEMPT THE SOUTH CAROLINA STATUTES AND ADMINISTRATIVE PROCEDURES ESTABLISHING THE INTERIM LEC FUND BECAUSE THEY CONFLICT WITH SECTION 254 OF THE COMMUNICATIONS ACT.**

Even apart from Section 253, traditional preemption doctrine provides an independent basis for preempting the statutes and administrative procedures establishing the South Carolina Interim LEC Fund. As the Commission has explained, the exercise of its preemption authority is “governed primarily by two distinct, but related, standards.”<sup>52</sup> The first basis for preemption is section 253. “Second, the Supreme Court has repeatedly affirmed federal preemption where there exists a conflict between federal and state law. Such a conflict may arise ‘where compliance with both federal and state law is in effect physically impossible’ or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>53</sup> In determining whether state law ‘stands as an obstacle’ to the full implementation of federal law, the Supreme Court has held that “it is not enough to say that the ultimate goal of both federal and state law is the same. A state law . . . is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal.”<sup>54</sup> It is well-established that “pre-emption may result not only from action taken by Congress itself, a

---

<sup>52</sup> *Texas Preemption Order* ¶ 6.

<sup>53</sup> *Id.* (quoting *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986), and *Fidelity Federal Savings and Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982)).

<sup>54</sup> *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 103 (1992).

federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.”<sup>55</sup>

In *Western Wireless* the Commission made an independent finding that the Kansas scheme “could well be found invalid under traditional preemption doctrine” because it conflicts with section 254.<sup>56</sup> As the Commission explained

We have previously held, in interpreting section 254 of the Communications Act, that competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a procompetitive, de-regulatory national policy framework. As discussed above, it is doubtful that a universal service funding program that restricts eligibility to ILECs could be considered competitively neutral. Thus, a program of this nature may well be found to be inconsistent with and to impede the achievement of important Congressional and Commission goals.<sup>57</sup>

South Carolina’s Interim LEC Fund likewise conflicts with section 254. As explained above, the Interim LEC Fund serves the same purposes as the Kansas scheme: it is a universal service support mechanism designed to make explicit subsidies for universal service that were implicit under the former monopoly regime. The Interim LEC Fund suffers from the same flaw that the Commission recognized in *Western Wireless*: it “restricts eligibility to ILECs,” and, therefore, is “inconsistent with” and “impede[s] the achievement of important

---

<sup>55</sup> *Louisiana PSC*, 476 U.S. at 369.

Congressional and Commission goals” with respect to implementation of universal service.<sup>56</sup> As a result, the Interim LEC Fund conflicts with section 254 of the federal Act and must be preempted

Moreover, the Interim LEC Fund conflicts with section 254 for an additional reason that the Commission identified in *Western Wireless*, but that was not present in the Kansas scheme. That is, the Interim LEC Fund is not “competitively neutral” in the “collection” of funds because it is funded only by long distance providers.<sup>59</sup> As the Commission acknowledged in *Western Wireless*, it has “previously held, in interpreting section 254 of the Communications Act, that competitive neutrality in the collection of funds . . . is consistent with congressional intent and necessary to promote a procompetitive, de-regulatory national policy framework.”<sup>60</sup> Specifically, the Commission has held that “as a guiding principle, competitive neutrality is consistent with several provisions of section 254 including the explicit requirement of equitable and nondiscriminatory contributions.”<sup>61</sup> Indeed, as shown above, section 254(f) expressly requires *state* universal service programs to be funded by *all*

---

<sup>56</sup> *Western Wireless* ¶ 11

<sup>57</sup> *Id.* (footnotes and quotations omitted)

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Universal Service Order* ¶ 48

telecommunications carriers who provide intrastate service<sup>62</sup> The Interim LEC Fund's discriminatory funding mechanism therefore directly conflicts with section 254(f) and other provisions of section 254, and must be preempted.

### **CONCLUSION**

For the foregoing reasons, AT&T respectfully requests that the Commission, pursuant to section 253 of the Communications Act and traditional preemption doctrine, preempt S C Code Ann §§ 58-9-280(L) & (M), which established the Interim LEC Fund, as well as the accompanying administrative procedures that govern the operation of the Fund

Respectfully submitted,

David Lawson  
Jackie Cooper  
Sidley Austin Brown & Wood, LLP  
1501 K Street, N W  
Washington, DC 20005  
(202) 736-8000

---

Mark C. Rosenblum  
Lawrence J. Lafaro  
Stephen C. Garavito  
AT&T Corp  
900 Route 202/206 North  
Room 3A250  
Bedminster, NJ 07921

October 7, 2002

---

<sup>62</sup> *Id* ("The principle of competitive neutrality is also embodied in section 254(f)'s requirement that state universal service contributions be equitable and nondiscriminatory")

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of October, 2002, I caused true and correct copies of the forgoing Petition for Preemption to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list

Dated    October 7 2002  
             Washington, D C

---

Patricia A. Bunyasi

### **SERVICE LIST**

Marlene H Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D C. 20554

Honorable Charlie Condon  
Attorney General  
P O. Box 11549  
Columbia, SC 29211

Mr Gary E Walsh  
Executive Director  
Public Service Commission of South Carolina  
101 Executive Center Drive  
Columbia, South Carolina 29210